IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 86 33

MURRAY WINTERS,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

This is an appeal pursuant to section 237(a) of the Judicial Code (28 U. S. C. A. § 344) and 45 Stat. 54 (28 U. S. C. A. § 861a) from a final judgment of the Court of Special Sessions of the City of New York (R. 49), entered upon an order of the Court of Appeals (R. 42-3) affirming (LEHMAN, Ch. J., dissenting) (R. 49) an order of the Appellate Division of the Supreme Court (R. 36-7) unanimously affirming a judgment of the Court of Special Sessions convicting the appellant of the crime of POSSESSING WITH INTENT TO SELL PRINTED PAPER DEVOTED TO ACCOUNTS OF DEEDS OF BLOODSHED, LUST OR CRIME (Penal Law, § 1141, subd. 2). The appeal was allowed by the Chief Judge of the Court of Appeals (R. 52-3).

Both appellate courts below rendered opinions which are officially reported *sub nom. People* v. *Winters*, 268 App. Div. 30; aff'd 294 N. Y. 545 (R. 37-41, 44-8).

Introduction

The appellant has been convicted of possessing, with intent to sell, some two thousand copies of magazines composed entirely of articles described by the appellate courts below as being "embellished with pictures of fiendish and gruesome crimes, * * * besprinkled with lurid photographs of victims and perpetrators" and having "such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult,' and 'Girls' Reformatory' " (R. 38, 46). These magazines, the New York Court of Appeals further observed, "plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46).

The defendant has at no time claimed any literary or other merit for the publications thus described. Nor did he contend in any state court that his constitutional rights have been violated by the manner in which the statute was applied thereto. His sole contention has been—and substantially still is—that the law under which he was convicted (Penal Law, § 1141, subd. 2) is unconstitutional on its face and that, accordingly, no conceivable set of facts could justify a conviction thereunder.[1]

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[1] The appellant thus posed the issue in his brief to the New York Court of Appeals (p. 8):

> "That the magazines, for the possession of which the appellant has been convicted, come within the provisions of subdivision 2 of Section 1141 of the Penal Law is not disputed. * * *
>
> "The determinative factor is not the publications involved in this case, or the facts of this case. It is whether subdivision 2 is valid or invalid. If it is invalid, no conviction under it can stand."

Similarly, in the trial court, the appellant based his motion to dismiss the information **solely** on the ground that the statute was invalid on its face; he made no contention that any constitutional or other question was raised by the application of the statute to the magazines before the court (R. 22-4; see, also, R. 29-30).

The New York Statute Involved

The statute under which the appellant was convicted is part of Article 106 of the Penal Law which deals generally with "indecency," and, so far as here relevant, provides:

> **"§ 1141. Obscene prints and articles.**
>
> "1. A person who * * *; or who,
>
> "2. Prints, utters, publishes, sells, leads, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who,
>
> "3. * * *
>
> "Is guilty of a misdemeanor * * *."

The omitted portion of subdivision 1 deals exclusively with such forms of obscenity and indecency as have relation to sexual impurity [see Opinion of Court of Appeals herein (R. 45); *People* v. *Eastman* (1907) 188 N. Y. 478]. The third subdivision, likewise omitted from the above quotation, has no bearing upon this appeal.

Construction Placed Upon the Statute by the New York Courts

Each of the three New York courts called upon to pass upon the appellant's guilt expressed an opinion as to the meaning of the statute here involved.

The Court of Special Sessions of the City of New York

The question of construction was first placed before the trial court when the appellant moved, at the close of the People's evidence, to dismiss the information on the ground that the statute was "clearly unconstitutional," in that "if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned" (R. 23), and "even Horatio Alger" and "the average detective story" would be prohibited (R. 24).

The court rejected this sweeping interpretation and, speaking through Mr. Justice Cooper, announced its opinion that it was not the subject matter of the appellant's magazine, but the "manner" in which the stories were "treated and handled" and the "typography, and the language used to depict these crimes" which brought them within the condemnation of the law (R. 24).

The Appellate Division of the New York Supreme Court

The Appellate Division ruled that the statute in no way interfered with publications "dealing with crime news as an incident to the legitimate purposes of science or literature" and that it did not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books" but was (R. 39):

> "aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts."

The Court of Appeals

The Court of Appeals re-emphasized the rulings of the courts below that it was the "manner of treatment" rather than the subject matter of the appellant's magazines which brought them under condemnation, and that the statute was not intended to interfere with any legitimate publication. Thus, in considering the appellant's contention that the statute was so broad as to condemn "any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment," the court, speaking through its present Chief Judge, observed (R. 45):

> "This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature."

Applying the doctrine that a legislative enactment must be read "in accordance with the general subject matter of which it is a part," the court then construed the statute as outlawing only "indecent or obscene" publications (R. 45). It ruled, however, that the terms *indecency* and *obscenity* should not be limited to "that form of immorality which has relation to sexual impurity" (*id.*). Thus, the court declared (R. 46):

> "Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necesarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute."

POINT I

As construed by the New York Court of Appeals the statute under attack does not conflict with the Fourteenth Amendment.

The appellant's entire attack on the statute appears to be based on the assumption that it outlaws "the publication of 'criminal news' alone, or 'police reports' alone, as well as 'accounts of criminal deeds,' * * * whether consisting of truth or statistics, as well as fiction" (brief, pp. 15-16). This argument ignores the circumstance that the New York Court of Appeals has specifically rejected such construction "on the short ground that its manifest injustice and absurdity were never intended by the Legislature" (R. 45), and has limited the statute to indecent or obscene collections of crime stories whose lurid details are "so massed as to become vehicles for inciting violent and depraved crimes against the person" (R. 46). So interpreted—as it must now be[2]—the statute presents no constitutional difficulty of any sort.

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[2] For the purposes of determining its constitutionality, the statute must now be read as though the very words used in the opinion of the New York Court of Appeals had been written by the legislature itself [*Smiley* v. *Kansas*, 196 U. S. 447, 455; *Gatewood* v. *North Carolina*, 203 U. S. 531, 541; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 449; *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139; *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506, 512; *Minnesota* v. *Probate Court*, 309 U. S. 270, 273; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572-3]. This doctrine has been "so frequently and uniformly" enunciated as to make it "axiomatic" [*Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32].

1. No question of the freedom of the press is presented.

It is patent that neither the principle of freedom of the press nor any other constitutional guarantee was intended to sanction publications designed to incite to criminal or immoral conduct. Indeed, this Court has repeatedly declared that statutes seeking the suppression of such utterances are not subject to attack on constitutional grounds (*Fox* v. *Washington*, 236 U. S. 273, 277; *Gitlow* v. *New York*, 268 U. S. 652, 667; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-2; see, also, *Rosen* v. *United States*, 161 U. S. 29, 43; *Near* v. *Minnesota*, 283 U. S. 697, 716; *United States* v. *Limehouse*, 285 U. S. 424; *DeJonge* v. *Oregon*, 299 U. S. 353, 364.

In *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 571-2, this Court, speaking through Mr. Justice MURPHY, ruled:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene * * *."

Similarly, in *DeJonge* v. *Oregon*, *supra*, 299 U. S. 353, 364, the Court, per Mr. Chief Justice HUGHES, observed:

> "These rights [freedom of speech and of the press] may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse."

None of the cases cited by the appellant is contrary to the foregoing doctrine, or in any way supports his present position. None of them deals with a statute designed exclusively to outlaw "vehicles for inciting violent and de-

praved crimes against the person" (R. 46). On the contrary, each deals with a situation where a state has—through the medium of a municipal ordinance or otherwise—sought directly to interfere with the practice of religion, or with the free expression of ideas on political or economic matters. Thus, six of the cases cited by the appellant involved freedom of religion (*Schneider* v. *State*, 308 U. S. 147; *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Douglas* v. *Jeannette*, 319 U. S. 157; *Board of Education* v. *Barnette*, 319 U. S. 624); three dealt with attempts to circumscribe the activities of labor unions or their agents (*Thornhill* v. *Alabama*, 310 U. S. 88; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Thomas* v. *Collins*, 323 U. S. 516); one was concerned with a state's attempt to suppress an unpopular political ideology (*Herndon* v. *Lowry*, 301 U. S. 242); one involved a state statute authorizing injunctions against newspaper editors who charged public officials with laxity and corruption (*Near* v. *Minnesota*, *supra*, 283 U. S. 697); and one struck down the attempt of a state court to foreclose public discussion of litigation pending before it (*Bridges* v. *California*, 314 U. S. 252).

The statute at bar, on the other hand, does not even remotely deal with the dissemination of ideas, and has no tendency whatever to "restrain orderly discussion and persuasion" (*cf. Thomas* v. *Collins*, *supra*, 323 U. S. 516, 530).

2. The statute is neither vague nor indefinite.

The appellant argues that because any conviction under the statute must necessarily rest upon a factual determination as to the obscenity of a given publication, it follows that "Different juries or different judges might • • •

render different rulings with respect to the same book" (brief, p. 17) and, consequently, that the statute is too vague to be enforceable. Such contentions have long since been foreclosed by decisions of this Court (*Rosen* v. *United States, supra,* 161 U. S. 29; *Nash* v. *United States,* 229 U. S. 373, 376-7; *Fox* v. *Washington, supra,* 236 U. S. 273; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *United States* v. *Ragen,* 314 U. S. 513, 523; *Chaplinsky* v. *New Hampshire, supra,* 315 U. S. 568, 574).

In *Nash* v. *United States, supra,* 229 U. S. 373, the Court had before it a contention that the Federal Anti-Trust Act was insufficiently precise to be enforceable. Speaking through Mr. Justice HOLMES, the Court rejected that argument, pointing out (at p. 377):

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

In *Hygrade Provision Co.* v. *Sherman, supra,* 266 U. S. 497, the Court, referring to Mr. Justice HOLMES' above-quoted dictum, observed (at p. 502):

> "Many illustrations will readily occur to the mind, as for example * * * statutes prohibiting the transmission through the mail of obscene literature, * * * which have [not] been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms."

In *Fox* v. *Washington, supra,* 236 U. S. 273, the doctrine of the *Nash* case was applied to facts analogous to those at bar. There, the plaintiff in error had been convicted under a statute making it unlawful to publish any printed matter

which, among other things, tended "to encourage or advocate disrespect for law or for any court or courts of justice" (p. 275). His particular offense had been the publication of an article entitled "The Nude and the Prudes," which was found to have a tendency toward encouraging and inciting persons to indulge in nude bathing in violation of the state laws against indecent exposure. In sustaining the statute and the conviction thereunder, this Court, speaking through Mr. Justice HOLMES, ruled (at p. 277):

> "We understand the state court by implication at least to have read the statute as confined to [writings] encouraging an actual breach of law. Therefore the argument that this act is both an injustifiable restriction of liberty and too vague for a criminal law must fail."

The present statute, as construed by the state court, is of much narrower scope than the one upheld in the *Fox* case. Its effect has been limited, not only to such publications as encourage crime in general but, specifically, to such as incite "violent and depraved crimes against the person" (R. 46).

Connally v. *General Construction Company*, 269 U. S. 385, *Stromberg* v. *California*, 283 U. S. 359, and *Williams* v. *North Carolina*, 317 U. S. 287, the three decisions of this Court upon which the appellant relies (brief, pp. 15, 18), have no application to the situation at bar.

In the *Connally* case, a statute making it criminal to pay a laborer "less than the current rate of per diem wages in the locality where the work is performed" was declared invalid on the ground that neither the law itself nor any recognized canon of construction provided a definition for

the term "current rate of • • • wages" or gave any indication as to how much territory was to be included in the phrase "locality where the work is performed" (269 U. S., at p. 393). As illustrated by *Fox* v. *Washington, supra,* 236 U. S. 273, and the other cases above cited, no such difficulty adheres in a statute like the one at bar.

In the *Stromberg* case, the defendant had been prosecuted under a statute containing three separate provisions, one of which was conceded to be unconstitutional, and the trial judge had explicitly charged the jury that they might find the defendant guilty on the unconstitutional part of the law without considering any of its other provisions (283 U. S., at pp. 363-4, 368). A similar situation was presented in *Williams* v. *North Carolina* (317 U. S., at pp. 291-2). Here, on the other hand, the theory of prosecution has been consistent throughout (see, *supra,* pp. 4-5).

Conclusion

The instant appeal aptly illustrates the observation recently made by the Chief Justice in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 470:

> "State courts • • • may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them."

The New York Court of Appeals having adopted the course outlined in the above quotation, no constitutional question survives. It follows that the appeal should be dismissed for want of a substantial federal question (*Quong Ham Wah Co.* v. *Industrial Comm.,* 255 U. S. 445, 449).

The appeal should be dismissed or, in the alternative, the judgment appealed from should be affirmed.

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